

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NEWMONT USA LIMITED and DAWN
MINING CO.,

Plaintiff,

VS.

AMERICAN HOME ASSURANCE CO., et
al..

Defendants.

NO. CV-09-033-JLO

**MEMORANDUM OPINION ON
SUMMARY JUDGMENT
MOTIONS**

A summary judgment motion hearing was held in the above-entitled matter on May 11, 2011. Attorneys participating on behalf of Plaintiffs were: James Reed and Andrew E. Appearances on behalf of Defendant Travelers were: Thomas James and Donald E. Bradley Smith, Ralph Luongo, and John Falls appeared on behalf of Defendants Beacon and Stonewall. This Memorandum Opinion is intended to memorialize and implement the oral and written rulings in the Amended Order Re: May 19, 2011 Hearing on Summary Judgment Motions (ECF No. 822).

I. Introduction

Plaintiffs' First Amended Complaint seeks a declaration of insurance coverage from numerous insurance carriers for costs and liabilities relating to environmental cleanup of the Midnite Mine uranium mine near Ford, Washington. Newmont and Dawn were held liable for certain response costs at issue in United States of America v. Newmont USA and Dawn Mining Company, LLC, Cause No. CV-05-020-JLQ, 2008 WL 4621566 (E.D.Wash. Oct. 17, 2008) ("Underlying Liability" or "underlying CERCLA action"). In addition, Plaintiffs seek a judicial declaration of Defendants' liability for response costs incurred since December 31, 2004, damages for bad faith claims handling,

1 and attorney fees. The court has stayed the cross-claims amongst insurers and ordered
2 that Plaintiffs' case be tried first.

3 Plaintiffs have settled their claims with all but three excess liability insurance
4 carriers: OneBeacon, Stonewall, and Travelers. Plaintiffs and each remaining Defendant
5 have filed (or joined) in a number of summary judgment motions. Due to the number of
6 motions pending and the voluminous filings and counter-filings, the undisputed material
7 facts necessary to rule are not set forth separately, but are included in the pertinent
8 analysis of each issue below.

9 **II. Procedural History**

10 The court has in previous orders detailed the procedural history of this case. In
11 short, simultaneous to this coverage action involving all parties involved in this dispute,
12 the Defendants have pursued a separate declaratory judgment action in New York state
13 court against Newmont only. Justice Ramos, who presided over the action in the New
14 York trial court, dismissed Dawn for lack of jurisdiction, rejected Newmont's motion to
15 dismiss based on forum non-conveniens, and proceeded to enter judgments in favor of the
16 carriers on the issue of coverage. Appeals of Justice Ramos' decisions were filed, and on
17 March 17, 2011 (after dispositive motions were filed in this case), the New York
18 Supreme Court, Appellate Division, First Department, issued an order dismissing the
19 carriers' claims against Newmont. ECF No. 701 at 10. The First Department held that
20 the trial court had "improperly exercised its discretion in retaining jurisdiction [over
21 Newmont], since Newmont established that New York is an inconvenient forum." ECF
22 No. 701 at 12-13.

23 Given the dismissal of the New York case, Newmont's coverage claims are not
24 barred by the doctrine of *res judicata* because one of the elements -- a valid final
25 judgment upon the merits -- is lacking, and neither would "full faith and credit" or equity
26 be served by applying the doctrine under these circumstances. Accordingly, the court has
27 denied the carriers earlier filed motions for summary judgment based upon the
28 application of *res judicata* and lifted the stay of Newmont's coverage claims. *See* ECF

1 No. 822.

2 As the parties filed response briefing to the motions for summary judgment after
3 the court stayed Newmont's coverage claims, the parties appropriately respected the stay
4 and proceeded with the argument pertaining to Dawn. The court has now lifted that stay.
5 ECF No. 820 [May 23, 2011 Order]. Whereas Newmont and Dawn have admitted that
6 their positions as to coverage are fully aligned, these rulings shall apply to the claims of
7 both Newmont and Dawn where appropriate.

8 **III. Motions Relying Upon Res Judicata**

9 Traveler's Motion for Partial Summary Judgment Against Dawn Mining Company
10 [ECF No. 596] and a portion of One Beacon and Stonewall's Motion for Partial Summary
11 Judgment Against Dawn Mining Based on Privity/Pollution Exclusions [ECF No. 632]
12 are based upon an assumption by the movants that *res judicata* would apply to bar
13 Newmont's coverage claims. Based upon this assumption, the Defendants moved for
14 summary judgment contending that Dawn is in privity with Newmont. Now that the
15 court has determined *res judicata* does not apply, the question of privity is irrelevant.
16 Accordingly, these motions have been denied by the court.

17 One Beacon and Stonewall have also filed a Motion For Summary Judgment on
18 the issue of scope of coverage/allocation (ECF No. 618). "Scope of coverage" or
19 "allocation" refer to the amount an insurer must pay to satisfy its obligation to indemnify,
20 or the distribution of liability. This motion asks the court to find the parties bound by the
21 choice of law decision made by the New York court on the issue of allocation. Again, this
22 motion is based upon the insurer movants' assumption this court would enter a final
23 ruling in accordance with its July 27, 2010 preliminary order regarding *res judicata*. *Res*
24 *judicata* does not apply, and therefore the Motion is Denied.

25 In any case, the issue of choice of law on the issue of allocation of damages with
26 respect to these parties has never been decided by any court. The insurer movants urge
27 the court to decide their motion (on *res judicata* grounds) in order to "provide guidance to
28 the parties with respect to the type and scope of evidence to be submitted at trial." ECF

1 619 at 2-3. Yet in Reply, the insurers oppose the Plaintiffs' request that the court analyze
2 the issue of choice of law and argument that Washington law should apply. Defendants
3 oppose the request arguing that the Plaintiffs did not pursue it in their own separate
4 summary judgment motion. The court agrees that the choice of law issue should have
5 been raised in a separate motion and without complete briefing, the court does not
6 determine the matter at this time.

7 However, the scope of the upcoming trial must be defined. The insurers' motion
8 poses a legitimate question as to whether allocation is a "coverage issue" or a "carrier
9 issue" and whether it will be part of the upcoming trial or part of the second phase of this
10 bifurcated case involving the cross-claims and third-party claims filed by all the insurers
11 against one another. Plaintiffs assert they have proceeded in discovery presuming
12 allocation issues would be part of the second phase of this case.

13 Allocating damages from ongoing losses over multiple liability policies and
14 multiple policy periods is a "nettlesome problem" for courts. See e.g., Comment,
15 Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi.
16 L.Rev. 257, 257-258 (1997) ("it is both scientifically and administratively impossible to
17 allocate to each policy the liability for injuries occurring only within its policy period.");
18 See 15 G. Couch, Insurance § 220:25, at 220-26 (3d ed. 2005) (with respect to
19 "environmental damage and toxic exposure cases ... it is virtually impossible to allocate
20 to each policy the liability for injuries occurring only within its policy period"). The
21 parties are also aware that there is a split among states on approaches to allocation.
22 Washington has adopted a form of the joint and several allocation approach. *American*
23 *Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wash.2d 413, 428-429
24 ((We hold that once a policy is triggered, the policy language requires insurer to
25 pay all sums for which the insured becomes legally obligated, up to the policy limits.
26 Once coverage is triggered for one or more policy periods, those policies provide full
27 coverage for all continuing damages, without any allocation between insurer and
28 insured"); See also *Villella v. Public Employees Mut. Ins. Co.*, 106 Wash. 2d 806, 812,

1 725 P.2d 957 (1986) (distinguishing factually, but not disagreeing with, a California case
 2 that had held "that a first insurer, who had been 'on the risk' when the negligent act was
 3 committed and the initial damage suffered, was responsible not only for that damage but
 4 also for the damages that accrued after its policy expired"). On the other hand a number
 5 of states, including New York, have adopted the pro rata allocation method, which
 6 allocates portions of the total loss to each triggered policy using a variety of different
 7 formulas, such as "time on the risk". *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*,
 8 98 N.Y.2d 208, 224-225 (2002).

9 Allocation and contribution claims are closely related. It is commonplace both in
 10 the law of insurance and generally that where one or more parties are obligated to
 11 indemnify a party, if an unfairness results, the indemnifying party can seek recovery from
 12 others pursuant to principles of contribution. The court agrees with the authors of this
 13 statement on the topic:

14 The policyholder should not be enmeshed in time-consuming or costly litigation to
 15 determine exactly how much of a person's asbestososis occurred in year one, how
 16 much in year two, and so on. If the insurers involved wish for administrative
 17 convenience to adopt a pro-rata approach, they are free to do so. If they wish
 18 instead to base allocation among insurers on the precise amount of injury suffered
 19 in each insurer's policy period, they are similarly free to follow that course.

20 *Whatever the allocation formula, it need not (and should not) involve the insured.*
 21 Each policy is a separate and independent contract.

22 Silverman, Laurence and Essig, Philip, *Stacking of Policy Limits and Joint and Several*
Liability of Insurers in Cases Involving Long-Term, Cumulative Injury or Damage, 369
 23 PLI/Lit 45(1989)(emphasis added).

24 Accordingly, issues pertaining to the amount of each insurers' responsibility will be
 25 decided in phase two of this case involving the insurers.

26 **IV. No Occurrence, Known Loss, Known Obligations for Reclamation**

27 This section discusses:

28 1. OneBeacon and Stonewall's Motion for Summary Judgment Against Plaintiffs
 based on No Occurrence [ECF No. 612];

1 2. OneBeacon and Stonewall's Motion for Summary Judgment Against Plaintiffs
2 based on Known Loss [ECF No. 615];

3 3. Travelers' [joined by OneBeacon and Stonewall] Motion for Summary
4 Judgment Against Plaintiffs based on Known Obligations for Reclamation [ECF No.
5 637]; and

6 4. Plaintiffs' Motion for Summary Judgment re: Contract Provisions [ECF No.
7 680]

8 **A. Background**

9 The purpose of insurance is to protect insureds against unknown, or fortuitous,
10 risks. Fortuity is an inherent requirement of all risk insurance policies. Generally, in each
11 of these three motions, the moving Defendants contend that either the terms of their
12 policy and/or the fortuity doctrine preclude any duty to provide coverage because the
13 insured purchased the policy when it was aware it has caused damage or created a
14 problem.

15 Plaintiffs have opted to file a consolidated extensive response to all three of the
16 Motions, though they raise distinct arguments as to each Motion. The “no occurrence”
17 and “known loss” arguments are based on similar facts – Newmont and Dawn’s alleged
18 knowledge about the contaminated water leaching from its ore, protore, and waste-rock
19 piles. The third Motion relating to reclamation obligations at the Midnite Mine is
20 factually distinct. Legally, the “no occurrence” motion is based on the terms of the
21 insurance policy, and is guided by one standard. The “known loss” motion and the
22 “known reclamation obligation” motion are public-policy based arguments guided by a
23 different standard. Travelers has **not** joined in the “no occurrence” or “known loss”
24 Motions.

25 There are thousands and thousands of pages of record evidence submitted on these
26 motions. The relevant time periods are critical undisputed facts. The three remaining
27 carriers issued policies between 1969 and 1975, as evidenced by the following policy
28 periods:

1 OneBeacon: July 1, **1969**-July 1, 1972; July 15, 1969-July 1, 1972; (ECF No. 635)
 2 Stonewall: July 18, **1975**-July 18, 1976; July 18, 1976-July 18, 1977; (ECF No.
 3 635)

4 Travelers earliest inception date: July 1, **1975**

5 These motions concern Plaintiffs' knowledge prior to the inception of their policies, i.e.
 6 pre-1969 (OneBeacon) and pre-1975 (Stonewall and Travelers).

7 **B. "No Occurrence" Motion**

8 **1. Legal Standard**

9 For coverage under a comprehensive general liability policy to apply, the insured
 10 must show some form of harm caused by an "occurrence." Each of the insurers, **except**
 11 **Travelers**, seek summary judgment based upon language in the insurance policy, arguing
 12 that there was "no occurrence" necessary to trigger coverage. The policyholder has the
 13 burden of showing the property damage qualifies as an occurrence. An "occurrence" is
 14 defined in the relevant policies as "an accident" which either "results...in....property
 15 damage **neither expected nor intended** from the standpoint of the insured" (Stonewall)
 16 or which "unexpectedly and unintentionally results in...property damage." (OneBeacon).

17 The term "Property damage" means "injury to or destruction of tangible
 18 property..." (Stonewall); "loss of or direct damage to or destruction of tangible property
 19 (other than property owned by the Named Assured)." (OneBeacon).

20 For property damage to be neither expected or intended, Washington law
 21 recognizes that the occurrence clause describes the subjective state of mind of the insured
 22 with respect to the property damage. *Overton v. Consolidated Ins. Co.*, 145 Wash.2d 417
 23 (Wash. 2002). This standard does not suggest that courts should ignore all objective
 24 evidence. "Since proof of state of mind normally is indirect or circumstantial, even a
 25 subjective test must rely on facts from which an inference about the insured's state of
 26 mind must be drawn, such as the obviousness of already occurring harm." *Id.* In addition,
 27 the insured need not have previously known about the property damage, or know the full
 28 extent of the actual property damage. *See, e.g., City of Redmond v. Hartford Acc. &
 Indem. Ins. Co.*, 88 Wash.App. 1, 8, 943 P.2d 665 (1997) ("Expectation ... is
 forward-looking and does not require that the damage have already occurred.").

1 *Overton* involved a dispute over comprehensive general liability insurance
2 coverage of clean-up costs for contaminated property previously owned by the insured.
3 The court determined that the insured had notice of contamination before purchasing the
4 policy because the EPA notified him of a single test result indicating elevated PCB
5 contamination on his property. The policyholder had not disclosed the test results to the
6 insurer when the policies were purchased. Accordingly, the court held the insured could
7 not claim that the property damage was unforeseeable or unexpected by him because he
8 had “notice” of the PCB contamination - the damage - which led to him incurring a legal
9 obligation to pay for the cleanup. The parties in *Overton* disputed whether the
10 unexpected event that is covered was the damage itself or the obligation to pay third party
11 property damages, i.e. the costs of cleanup resulting from the lawsuit for contribution.
12 The Washington Supreme Court stated that under the terms of the policy, the proper
13 question was when the property damage as defined by the policy occurred, not when the
14 subsequent damages from compensating for the damage that occurred. The Court held
15 there was no “occurrence” requiring the insurer to pay. The Court further established that
16 the proper standard to apply to determine whether property damage is intended or
17 expected, is whether the insured had notice of the damage prior to purchasing the policy.

18 To understand the “notice” standard utilized in *Overton*, other case law is
19 informative. *See e.g., City of Redmond v. Hartford Acc. & Indem. Ins. Co.*, 88 Wash.
20 App. 1, 943 P.2d 665 (Div. 1 1997), review denied, 134 Wash. 2d 1001, 953 P.2d 96
21 (1998). In *Redmond*, the insured was repeatedly alerted by metropolitan authority that its
22 discharges into a public sewer system were more acidic than permitted and informed the
23 insured that acidic discharges might damage system. The court ruled the insured was
24 deemed to have had “notice of the defective condition”, i.e. PCB contamination.
25 Therefore, the damage to the city's sewer pipes caused by the insured's discharge of acidic
26 wastes far in excess of what was allowable under its discharge permit was not an
27 “occurrence.”

1 In *Gruol Construction Company, Inc. v. Insurance Company of North America*, 11
2 Wash.App. 632, 524 P.2d 427 (1974), Kenneth Gruol owned a construction business. He
3 was sued for dry rot caused by backfilling that piled dirt against a building's box sills
4 during construction. The dry rot was not discovered until four years after the completion
5 of the building. In a suit brought by Gruol against his insurers, the court considered
6 whether the dry rot was an "accident" or "occurrence" under the policy. The policy
7 defined an "occurrence" as an "accident" or a "'continuous or repeated exposure to
8 conditions which unexpectedly and unintentionally causes injury to or destruction of
9 property.'" *Id.* at 634, 524 P.2d 427. The court concluded there was coverage because
10 the dry rot was an invisible condition unknown to Gruol.

11 **2. Facts**

12 In this case, as described in this court's Findings of Fact and Conclusions of Law
13 in the underlying CERCLA case, the property damage at the Midnite Mine was the
14 "**widespread distribution of contaminated surface materials in and near the Midnite**
15 **Mine area" stemming from the mining operation having exposed rock which led to**
16 **the release of sediments through acid rock drainage and radioactive decay.** ECF No.
17 514 at 57. The question becomes whether this damage was "neither expected nor
18 intended" by Dawn and Newmont, or whether, as contended by some, Dawn and
19 Newmont knew of the damage (the widespread contamination) by the time it purchased
20 its policies from the Defendants.

21 The record evidence submitted on this "no occurrence" Motion is voluminous.
22 Nearly every factual allegation is disputed by Plaintiffs, who mostly claim the cited facts
23 are misleading, and sometimes false or misquoted. The key undisputed *material* facts are
24 set forth below.

25 The Midnite Mine operated in phases, the first phase running from 1956-1964.
26 There was then an idle interim period, before the beginning of phase two, which operated
27 from August 1969 to November 6, 1981, when mining ceased permanently. As this court
28 noted in its Findings of Fact in the underlying litigation, the processes used to conduct

1 open pit mining (such as drilling, stripping overburden, trenching, excavating, forming
2 adits, stockpiling and storing excavated material) are intrusive in nature. The mining
3 operations involved the creation of and storing waste rock and protore (rock containing
4 uranium in amounts that it is not economic to process) on-site. It was known that the
5 waste rock and protore would be exposed to the elements. At the Midnite Mine, far more
6 waste than ore was produced.

7 In 1964, Dawn sent a memorandum to Newmont reporting that uranium had
8 leached from a stockpile of ore that had yet to be processed. ECF No. 669 at 623.

9 We had a very wet fall and in order to clear some of the pools of water in the
10 stockpile area, a bulldozer was used to dig a hole for the water to drain into. Down
11 about 4 feet, a layer of yellow oxide of uranium was encountered which may have
12 been up to 24" thick. The open spaces in the gravel were completely filled with the
13 oxide....

14 It is evidence that a certain amount of leaching is going on in our stockpiles and
15 this may account in part for the shortage that has been experienced...
16 ECF No. 669-4 at 623.

17 William Humphrey, VP of operations at Newmont in the 1970's, testified at his
18 deposition in this current litigation that he was aware of acid rock drainage in the 1950s.
19 He testified that "Any mine that you build that has sulfites usually has acidic discharges"
20 and that he had acid mine drainage issues at all of the other western mines that he was
21 overseeing. ECF No. 667-12; pg 69:1-21.

22 In November 1975, a letter from Dawn's resident manager to Newmont indicated
23 its interest in continuing to explore the mine site by studying groundwater movement in
24 favorable areas. ECF No. 669, Ex. 32b. In a report dated June 22, 1976, the USGS
25 published a report of Dr. James K. Otton documenting stream sediment samples taken
26 near the Midnite Mine. Its stated purpose was "to make available data that may be of
27 interest to the exploration community." ECF No. 669-7, Ex 32a. The results described
much higher levels of uranium and heavy metal contents in Blue Creek than other
upstream surrounding areas, and noted a white film staining on rocks. In 1976, the Dawn
Board hired a consultant to investigate the cost of future reclamation.

28 This Court found in the underlying litigation that by "[a]t least by 1977, the BIA,

1 Dawn, and the Spokane Tribe realized that “‘pollution-related reclamation and restoration
 2 costs’ would be significant, and the parties renegotiated the royalty agreements
 3 accordingly.” ECF No. 514 at 29; *See also*, ECF No. 667, SOF No. 48.

4 On May 16, 1977, the USGS wrote to Dawn’s resident manager, Earl Craig
 5 regarding Dawn’s proposed 1977-1980 mining plan. The letter commented that:

6 The Hill 4, Area 1, 2- Waste, dumped in a rather narrow canyon west of Area 2,
 7 will most likely divert run-off to adjacent canyons. Part of the drainage water will,
 8 of course, still seep through the waste pile and possibly reduce stability.
 Construction of diversion channels could be required to intercept surface run-off
 and to conduct it to better drainage locations. Selection of a new dumpsite in an
 area with more favorable drainage features should be considered.

9 The letter indicated that “Seeding, pollutant containment, [and] erosion control were not
 10 adequately discussed” in Dawn’s proposal. ECF No. 669-18. As pointed out by
 11 Plaintiffs, this letter was expressing concern with slope stability, not pollution from acid
 12 rock drainage. After a later site inspection, a USGS report (August 1977) documents that
 13 water quality data was “inadequate to non-existent” from downstream drainages and that
 14 Dawn’s resident manager had expressed hesitation to sample fearing that evidence of an
 15 increased radiation load would be attributed to the mine operations. ECF No. 667 SOF
 16 49, Ex. 43.

17 Due to the Midnite Mine’s geography and as the mine’s operations progressed,
 18 drainage became an issue at the Midnite Mine. Every spring, water would accumulate in
 19 the bottom of the open pits and had to be pumped out before mining could resume. As
 20 this court found, “[d]uring the summer of 1978, water started flowing from the waste
 21 dumps at a rate of 10 to 40 gallons per minute and the water contained a white
 22 precipitate” and contained elevated levels of uranium and radium. By July 1978, Dawn
 23 acknowledges that it knew water at the Midnite Mine was contaminated and seepage was
 24 occurring. ECF No. 726 at 14, 15. Dawn, in conjunction with BIA and USGS
 25 monitoring, thereafter began initiating control efforts, monitoring and studies in regards
 26 to mine effluents, including the construction of a pollution control dam.

27 Pollution control issues remained after the mining operations ceased in late 1981.
 28 By 1983, a study group determined short-term actions were necessary to “immediately

1 manage mine drainage.” The weather in the spring of 1983 created higher runoff
2 volumes and influx into the pollution control pond such that it created a situation
3 reaching “critical proportion” where the control pond was filled to capacity. ECF No.
4 514 at 60. On March 17, 1983, Dawn was ordered by the BIA to take whatever steps to
5 prevent “further degradation of waters resources in the mining area” because the site
6 contained unacceptable concentrations of contaminants sufficient to constitute a human
7 and livestock health hazard. ECF No. 514 at 61.

8 In 1986, Dawn received a permit to discharge accumulated waters from the
9 retention ponds. EPA inspections then revealed that the discharges exceeded the permit’s
10 effluent limitations. Dawn was issued a consent order requiring a seepage control/mine
11 water discharge plan.

12 3. Analysis

13 Plaintiffs' consolidated response brief frames the issue as follows: whether there is
14 no genuine issue of material fact that Dawn expected or intended “with substantial
15 certainty” the “off-site environmental contamination to result from operation of the
16 Midnite Mine prior to or at the inception of the policies.” They argue it is possible to
17 find accidental results flowing from intentional causes. Plaintiffs’ theory is that instead
18 of a deliberate act of mining producing predictable damages, the “loss” in this case
19 resulted from accidental events – the impacts of precipitation and storm water on piles of
20 waste rock and protore where the regulators, the landlord (Tribe/BIA), and Newmont and
21 Dawn all did not anticipate any of the resulting harm. Plaintiffs’ claim that the carriers'
22 “general contentions with the benefit of hindsight some thirty-plus years later,” does not
23 carry the day. Plaintiffs deny they were actually informed of or had knowledge of acid
24 rock drainage or groundwater contamination at the time the carriers’ policies were issued.

25 The relevant property damage at issue here, as stated in the above section, is
26 widespread (both on-site and off-site) sediment distribution or leaching. By 1984, well
27 after the purchase of the policies at issue herein, the record is undisputable that Dawn had
28 knowledge that water resources in the mining area contained unacceptable concentrations

1 of contaminants. The "damage" as a result of the Midnite Mining operations at this point
2 was obvious, indeed of "critical proportion" and unequivocally must have been
3 "expected" by Dawn. The leaching of contaminants was a defective condition aware of
4 by Plaintiffs at some time which was the same type of damage that gave rise to Plaintiffs'
5 eventual liability.

6 There is no evidence that prior to 1975 Plaintiffs were on notice of actual off-site
7 contamination. The record evidences that by this date testing of groundwater was
8 virtually non-existent. Accordingly, OneBeacon and Stonewall have failed to meet their
9 burden of proving as a matter of law that the occurrence was either expected or intended.
10 The Motion For Summary Judgment based on "no occurrence" (ECF No. 612) is Denied.

11 **B. Non-fortuity Defense: "Known Loss"**

12 **1. Legal Standard**

13 OneBeacon and Stonewall have also moved for summary judgment based upon
14 their assertion of the "known loss" defense which is considered part of the "fortuity"
15 requirement that runs through insurance law. The fortuity principle is not based in
16 contract (and therefore has been criticized by many courts, including in Washington) and
17 has the effect of an exclusion.

18 That is, an all-risk policy might provide coverage for all risks minus named
19 exclusions, but never provides coverage for nonfortuitous events, even though
20 nonfortuitous events are not named exclusions in the policy. For this reason, the
fortuity principle is sometimes called the unnamed exclusion.

21 *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wash.2d 517 (Wash.
22 2000)(citations omitted).

23 The analysis for this nonfortuity defense and the expected/intended policy issues
24 are separate and distinct. The "known loss" defense is a public policy-based affirmative
25 defense providing that in order to avoid coverage an insurer must prove that the insured
26 was aware that the loss would occur at the time the policy was formed. There are as
27 many formulations of the doctrine as there are jurisdictions that apply it, but the fortuity
28 doctrine is part of both New York and Washington law. As both New York and

1 Washington recognize the doctrine, the presumptively applicable law is the law of the
2 forum.

3 The leading Washington case stems from 1994, *Public Utility District No. 1 of*
4 *Klickitat County v. International Ins. Co.*, 124 Wn.2d 789 (1994)(PUD No 1). In *PUD*
5 *No. 1*, the Washington Supreme Court held that the known loss doctrine bars a
6 policyholder from collecting under an insurance policy for losses that he, she, or it
7 subjectively knew of when the policy was purchased. Certain public utility districts
8 (“PUD”) and individual PUD employees and commissioners were sued for securities
9 violations regarding the Washington Public Power Supply System bond default. In the
10 ensuing coverage litigation, the insurer argued that coverage was precluded by the
11 “known risk” doctrine because when the insurance policy was issued in 1982, the
12 insureds knew that there was a risk they might be sued, and that there was a possibility
13 they might be subject to some undetermined type of liability, albeit at that time there
14 were no claims actually pending. The Supreme Court upheld the trial court’s jury
15 instruction which read as follows: “The ‘known risk’ principle only applies if you find
16 that the insureds knew that there was a **substantial probability** that they would be sued
17 by the bondholders for securities violations at the time the ... policy was issued.”

18 The Court held that the doctrine would apply only where the insured knew of a
19 **substantial probability of liability of the same type that eventually occurred**. The
20 Court ruled that as the insured lacked knowledge of any liability, the known loss defense
21 was inapplicable. The Supreme Court also ruled that the known loss determination is,
22 usually, a question of fact, and that summary judgment is inappropriate if the
23 policyholder's subjective knowledge/scope of subjective knowledge is unrecorded. The
24 court held that “[t]he knowledge that some loss may occur in the future is the driving
25 force behind the purchase of insurance [and a] finding that this general knowledge
26 precludes coverage would be much too broad.”

27 Prior to the *Public Utility No. 1* case, was the case of *Time Oil v. CIGNA Property*
28 & *Casualty Insurance Co.*, 743 F.Supp. 1400 (W.D.Wash. 1990). *Time Oil* involved the

1 contamination of a major aquifer, the South Tacoma Channel Aquifer. Before 1964, and
2 subsequent thereto, until 1976, an oil recycling facility was operated on property in
3 Tacoma. In 1981, the EPA detected contamination, and in 1982, the EPA advised the
4 insured that it had been identified as a potentially responsible party (PRP). In 1984, the
5 EPA notified the insured that investigation disclosed that the parcel was the principal
6 source of contamination at the drinking water well near the parcel. Also in 1984, the EPA
7 issued an administrative order under the Comprehensive Environmental Response,
8 Compensation, and Liability Act (CERCLA) directing the insured to take remedial
9 action. In the meantime, the state and local authorities sued the insured to recover
10 response costs incurred in eliminating the contamination at a nearby drinking water well,
11 and to enjoin further release of hazardous substances. When the United States, through
12 the EPA, filed a separate suit for CERCLA response costs, the two actions were
13 consolidated. Finally, in 1988, the insured entered into a consent order with the various
14 government entities.

15 In the insurance coverage declaratory judgment action, one group of defendant
16 insurers sought a ruling that the pollution was a “known risk” as of 1974, and, therefore,
17 there was no occurrence. The other group of insurers argued that no occurrence took
18 place after 1982 because, again, there was a “known risk.” The court denied the former
19 motion and granted the latter. As for the former, the court held that, as the parties
20 “presente[d] widely divergent views regarding the nature and cause of the contamination
21 which gave rise to the \$8.5 million liability of [the insured],” summary judgment was
22 inappropriate. Concerning the post-1982 motion, however, the court held that the PRP
23 letter the insured received in May 1982, notified [the insured] “that there was a
24 substantial probability that it would be required to pay response costs relating to the
25 contamination.” The court elaborated:

26 In May, 1982, Time Oil might not have known, as a certainty, that it **would be**
27 **found liable** for the contamination of the South Tacoma Channel acquired in Well
12A. Nevertheless, before obtaining additional insurance which would cover that
damage, public policy concerns and equitable principles dictate that Time Oil
should have revealed the existence of **the substantial probability that it would**
28 **be required to pay response costs relating to the contamination.**

1 743 F.Supp. 1400 (W.D.Wash. 1990).

2 **2. Analysis**

3 Additional facts the court considers here are that CERCLA became effective on
4 December 11, 1980 and the EPA did not plan on listing the Midnite Mine on the
5 Superfund National Priorities List until February 1999.

6 The facts before this court are not like *Time Oil*, where the insured was on notice
7 from the EPA that it was potentially responsible for contamination. The court can not
8 infer from the fact that Dawn was engaged in open pit mining that Dawn had knowledge
9 of substantial probability that its activities would result in environmental liability. If this
10 were the case, mining would never be insurable. There are insufficient facts for this court
11 to conclude as a matter of law, that as of July 1984, or at any time before that, Dawn and
12 Newmont were aware of the existence of the substantial probability that it would be
13 required to pay response costs related to the contamination at and around the Midnite
14 Mine. Indeed, CERCLA was not even in effect until 1980, which was 11 years after
15 OneBeacon's earliest policy inception and 5 years after Stonewall's policy inception date.
16 The "known loss" doctrine seems to originate in avoiding insurance fraud. There is no
17 suggestion these insurers were defrauded. OneBeacon and Stonewall's Motions re
18 "Known Loss" are Denied.

19 **C. Known Obligation for Reclamation**

20 Travelers' raises its fortuity-defense in a separate motion (joined by the other
21 insurers) (Motion for Summary Judgment re: Known Obligation for Reclamation) and is
22 more specific than the "Known Loss" motion just discussed. Instead of asserting that
23 Plaintiffs' entire loss was substantially known at the inception of its policies, Travelers
24 limits its motion to the claim that at a minimum, Plaintiffs' obligation to reclaim the mine
25 was a required part of its leases and regulatory obligation, thus part of the ordinary course
26 of and an inherent part of the mining business. In essence, the contention is that if a
27 business operation inherently entails harming the environment and the business leases
28 property to operate that inherently damaging business, but agrees to restore the property,

1 there can be no comprehensive general liability coverage for liability relating to this
2 economic cost of doing business.

3 Travelers, joined by the other carriers, contend Plaintiffs' lease and regulatory
4 obligations to reclaim the Midnite Mine Site were planned, intended, known and
5 substantially certain to occur before the insurance policies herein were issued (pre-1975),
6 and therefore the reclamation obligation was not any form of a "risk" that was insurable.
7 In essence, they argue the duty to pay to restore the mine area was mandated by the leases
8 and regulatory requirements, and therefore liability for this task is not a contingent risk.

9 The original 1954 lease and the 1956 mining leases contain terms regarding the
10 prevention of waste which provide that Plaintiffs were "to take appropriate steps for the
11 preservation of the property" and "promptly...return the premises upon the termination of
12 this lease...in as good as condition as received, excepting for the ordinary wear and tear
13 and unavoidable accidents in their proper use..." ECF No. 642 at Exs. 2, 3. The 1964
14 leases provide that "On termination of operation under this lease, the lessee shall make
15 provisions for the conservation, repair, and protection of the property and leave all of the
16 areas on which the lessee has worked in a condition that will not be hazardous to life or
17 limb..." ECF No. 642, Exs. 4, 5. Travelers' has also set forth in their separate Statement
18 of Facts, facts concerning the development of environmental policy and reclamation
19 obligations in the Code of Federal Regulations. In the underlying CERCLA litigation,
20 this court held that in 1972, Dawn initiated a reclamation program to refill old, mined out
21 pits with waste rock from new pits and to restore the surface elevation of the old pits to
22 their original elevations. ECF No. 514 at 27.

23 Plaintiffs' consolidated response brief to the No Occurrence/Known Loss motions
24 and this motion does not specifically mention the Travelers motion.. Plaintiffs do admit
25 therein that their leases with the Spokane Tribe and federal regulations "obligated
26 Newmont and/or Dawn to perform reclamation work." ECF No. 726 at 24. Plaintiffs'
27 response to Travelers' assertions are partially found in Plaintiffs' own Motion for
28 Summary Judgment (ECF No. 680) which asks the court to declare that "the carriers'

1 policies are available to provide coverage for sums Newmont and Dawn are obligated to
 2 pay by reason of liabilities they assumed under leases with the Spokane Indian Tribe and
 3 certain allottees for damages on account of third-party property damage.” ECF No. 681 at
 4 15.

5 Located in their separate Statement of Facts in response to Travelers' motion
 6 Plaintiffs also state their position (ECF No. 728 at ¶ 56):

7 [Traveler's Fact No.] 56: Dawn maintains it began fulfilling its reclamation
 8 obligation since at least 1972 but it did not and does not seek insurance coverage
 9 for those costs that it incurred. See Amended Complaint (Dkt. 241). See also
 10 James Decl. at Ex. 22 (Lipson 30(b)(6) dep.) at p. 74, lines 12-15.

11 Response to Travelers' Fact No. 56: Disputed. **Dawn does not seek insurance**
 12 **coverage for reclamation expenses that it did not incur pursuant to a**
 13 **third-party claim. Dawn further does not seek insurance costs for the**
 14 **reasonable costs of mine reclamation versus the unreasonable remedy the**
 15 **EPA chose to impose.** [Doc. 472 at 10 (“Newmont and Dawn seek declaratory
 16 relief that they have insurance coverage for those costs the EPA seeks to impose
 17 for environmental remediation both before and after December 31, 2004.”)].

18 This response seems to clarify that Plaintiffs seek coverage for 1) liabilities they
 19 assumed under leases with the Spokane Indian Tribe and certain allottees for damages on
 20 account of third-party property damage; and 2) for the costs of performing the
 21 “unreasonable remedy the EPA has chosen to impose.” ECF No. 728 at ¶ 56. Plaintiffs
 22 claims these costs were not anticipated or expected or known to be substantially probable.

23 Plaintiffs have been in a dispute with the EPA regarding the *extent* of the
 24 reclamation work that ought to be required. As this court has previously held, the
 25 reasonableness of the remedy contained in the EPA's Record of Decision is a dispute
 26 between the EPA and Plaintiffs, and has not been presented to this court. Plaintiffs
 27 contend that if the costs of performing reclamation likely exceeds what it considers is a
 28 reasonable amount, then such excess unreasonably incurred costs are insurable.
 Defendants Reply that this theory is “absurd”, and argue that at a minimum, based on
 Plaintiffs' own admission, Defendants are entitled to an order that 1) no **reasonable** costs
 of reclamation are covered and 2) the cost of performing reclamation to which Plaintiffs
agree or that are judicially approved are by definition “reasonable.”

The court declines to impose Defendants narrow interpretation of the known loss

1 doctrine to preclude any potential coverage for the cost of cleanup obligations Plaintiffs
2 have. Insurance coverage is precluded when an insured is aware of actual losses or
3 *known* potential losses. The "known loss" doctrine does not preclude coverage of
4 *unknown* potential accidental property damage, a potential risk of loss created by
5 Plaintiffs' reclamation obligation for which obtaining insurance was a sensible business
6 judgment. Plaintiffs, as the policyholders, will still have the burden of showing the
7 claimed property damage qualifies as an occurrence. A question of fact exists as to
8 whether the property damage in this case resulted from routine and commonplace events
9 which occurred as a result of Plaintiffs' regular business operations (and thus whether
10 Plaintiffs' damages are an uncovered incidental cost of doing business), or whether all or
11 a portion of the property damage was caused by an accident, whereby Plaintiffs would
12 not have anticipated having to incur such additional economic loss. Though some
13 environmental impact is inherent part of Plaintiffs business, knowledge of this fact or
14 knowledge that the task of remediation would be required, does not preclude coverage for
15 the unexpected costs of remediating unforeseen environmental harm caused by an
16 accident.

17 Based upon Plaintiffs admission that they do not seek coverage for ordinary costs
18 of reclamation, which are part of doing business, the court grants in part and denies in
19 part Motion for Summary Judgment based upon Known Obligation for Reclamation
20 (ECF No. 637). The court denies Plaintiffs' Motion for Summary Judgment Re: Contract
21 Provisions (ECF No. 280). Either Plaintiffs can prove that their loss falls under covered
22 "property damage" or not. Their motion does not ask this court to decide that issue, and
23 therefore the court will not, on an advisory basis, attempt to define the scope or construe
24 the effect of the Plaintiffs' lease obligations.

25 **IV. Pollution Exclusions**

26 The court also has before it several motions raising issues of policy interpretation
27 regarding pollution exclusion clauses in the Travelers' and OneBeacon policies. Included
28 are Plaintiffs' Motion for Partial Summary Judgment Regarding Pollution Exclusions

[ECF No. 675] and a portion of One Beacon and Stonewall's Motion for Partial Summary Judgment Against Dawn Mining Based on Pollution Exclusions [ECF No. 632]. Plaintiffs' Motion asks the court to declare in its favor that 1) the "sudden and accidental" pollution exclusion contained in Travelers' policy no. 01 XN 1448 WCA does not bar coverage for Dawn's liabilities arising out of the Midnite Mine; and 2) Endorsement 13 of OneBeacon's policies E 60003 and E 60104 is an oil industries exclusion inapplicable to Newmont's operations at the Midnite Mine. As an alternative to its Motion based on the privity doctrine, OneBeacon seeks a dismissal of Plaintiffs' claims for coverage based on application of its pollution exclusion.

A. Interpretation of Insurance Contracts

There is no contention that Washington and New York law differ on the law governing the court's interpretation of insurance policies. The court is not asked to make a choice of law decision and accordingly, the court may rely upon the presumptively applicable law, the law of the Washington forum state.

The interpretation of an insurance contract is a question of law, properly decided on summary judgment unless "contract terms are ambiguous and contradictory evidence is introduced to clarify the ambiguity." *Estate of Sturgill v. United Servs. Auto. Ass'n*, 84 Wash.App. 877, 880 (1997). The meaning and validity of parties' respective insurance policies is resolved as a matter of law. *Safeco Ins. Co. of Ill. v. Auto. Club Ins. Co.*, 108 Wash.App. 468, 472 (2001).

Insurance policies are construed as contracts. *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 378 (1996). "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." RCW 48.18.520. If there are two insurance policies, the court will preserve the integrity of each if they can be read together without conflict. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wash.App. 695, 701 (1984). An insurance policy is construed as a whole, with the policy being given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Key Tronic*

1 *Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wash.2d 618, 627, 881 P.2d
 2 201 (1994) (*quoting Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 95, 776 P.2d 123
 3 (1989)).

4 The “touchstone of contract interpretation is the parties' intent.” *Go2Net, Inc. v. C*
 5 *I Host, Inc.*, 115 Wash.App. 73, 83–84, 60 P.3d 1245 (2003) (*quoting Tanner Elec. Coop.*
 6 *v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996)).
 7 Washington courts follow the objective manifestation theory of contracts, looking for the
 8 parties' intent as objectively manifested rather than their unexpressed subjective intent.
 9 *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005).
 10 Thus, a court considers only what the parties wrote, giving words in a contract their
 11 ordinary, usual, and popular meaning unless the agreement as a whole clearly
 12 demonstrates a contrary intent. *Hearst*, 154 Wash.2d at 504, 115 P.3d 262.

13 A court reads a contract as an average person would, giving it a practical and
 14 reasonable meaning, not a strained or forced meaning that leads to absurd results. *Allstate*
 15 *Ins. Co. v. Hammonds*, 72 Wash.App. 664, 667 (1994). The court harmonizes clauses that
 16 seem to conflict in order to give effect to all the contract's provisions. *Nishikawa v. U.S.*
 17 *Eagle High, LLC*, 138 Wash.App. 841, 849 (2007).

18 Insurance limitations require clear and unequivocal language. *Bordeaux, Inc. v.*
 19 *Am. Safety Ins. Co.*, 145 Wash.App. 687, 694 (2008). When called upon to do so, courts
 20 construe ambiguities in favor of coverage. *Key Tronic*, 124 Wash.2d at 630, 881 P.2d
 21 201. The insurer bears the burden of showing an exclusion applies. *McDonald v. State*
 22 *Farm Fire & Cas. Co.*, 119 Wash.2d 724, 731(1992).

23 **B. Travelers**

24 **1. Facts**

25 This Motion concerns just one of Travelers' four excess policies issued to
 26 Plaintiffs, specifically the one for the period July 18, 1977 - July 18, 1978 policy (77-78
 27 policy). The 77-78 policy is in dispute because it contains *fewer* express exclusions than
 28 were contained in the Travelers policies issued to Plaintiffs in the years immediately

1 before it.

2 It is undisputed that the first three Travelers policies (from 1975-1977) expressly
 3 set forth a “sudden and accidental” pollution exclusion which generally applied to all of
 4 Newmont’s subsidiaries such as Dawn. One of the policies, the 76-77 policy, contains
 5 two “sudden and accidental” pollution exclusions: one generally applicable to all
 6 Newmont subsidiaries and another which is expressly limited in its application to
 7 Newmont Oil Company. The disputed 77-78 policy does not contain two pollution
 8 exclusion clauses -- it only expressly contains a pollution exclusion which is limited by
 9 its terms to application to Newmont Oil.

10 However, Travelers' 77-78 policy states in Section 2 entitled “Indemnity
 11 Agreement” that it will indemnify the insured against sums which the insured “becomes
 12 legally obligated to pay or has paid on account of any one accident or occurrence, and
 13 **which would be covered by the terms of the Controlling Underlying Insurance...**”
 14 ECF No. 684, Ex. 29

15 It is undisputed that the controlling underlying insurance policy is California
 16 Union Policy no ZCU 00 07 01 for the matching period, July 18, 1977- July 18, 1978
 17 (“Cal Union 77-78 policy”).

18 The Cal Union 77-78 policy contains two pollution exclusions, just as the 76-77
 19 Travelers policy did: a generally applicable sudden and accidental exclusion and a more
 20 specific exclusion pertaining to Newmont’s oil industries. ECF No. 702, Ex. A.

21 **2. Analysis**

22 Dawn argues in its Motion For Summary Judgment that coverage under the
 23 Travelers 77-78 policy is limited only by the exclusions expressly contained in Travelers’
 24 77-78 policy, namely an exclusion only applying to Newmont Oil Company. However,
 25 Travelers argues the language “which would be covered by the terms of the Controlling
 26 Underlying Insurance” causes the sudden and accidental exclusion in the underlying
 27 insurance to apply to the Travelers’ excess policy.

28 An excess policy covering the same risks that are covered by the underlying policy

1 is known as a “following form” policy. Plaintiffs argue that the evidence shows that
2 Travelers policy was written on a stand alone basis given that there is not a separate clear
3 and express clause expressing incorporation of underlying exclusions; and given the
4 contextual clue that all three previous excess policies issued to Newmont from 75-77
5 contained express pollution exclusion exclusions, though such exclusions already existed
6 in underlying policies.

7 There are many types of excess insurance and variations of each type. But it is
8 generally understood across all types that primary insurance first pays toward the loss.
9 Excess insurance then pays after the limit of the primary insurance is exhausted. Excess
10 insurance policies can be classified by type: “stand alone” and “following form.” In
11 Richmond, Rights and Responsibilities of Excess Insurers (2000), 78 DENV.U.L.REV. 29,
12 29–31, the differences between a “stand alone” or excess policy that “follows form” were
13 explained.

14 A true excess policy does not broaden the underlying coverage. While an excess
15 policy increases the amount of coverage available to compensate for a loss, it does
16 not increase the scope of coverage. An excess policy may be written on a “stand
17 alone” basis or as a policy that “follows form.” A stand-alone excess policy relies
18 exclusively on its own insuring agreement, conditions, definitions, and exclusions
19 to grant and limit coverage. A following form excess policy incorporates by
20 reference the terms, conditions, and exclusions of the underlying policy. An excess
21 policy that follows form is designed to match the coverage provided by the
underlying policy, although some following form policies contain exclusions
beyond those found in the primary policy, and policy provisions sometimes
conflict. To the extent the language of a primary policy and a following form
excess policy differ, the terms of the excess policy control where the excess
coverage is implicated. Of course, an insured that purchases two or more
concurrent excess policies to insure against large risks may layer both stand alone
and following form policies.

22 Typically a “follows form” policy will contain a clear express clause such as “Except as
23 otherwise provided in this policy, this policy shall follow all the terms, conditions,
24 definitions and exclusions of the controlling underlying policies.”

25 While it is true that the 77-78 Travelers policy does not contain a clear following-
form provision sometimes found in some policies, the plain language of the 77-78
26 policies’ indemnity clause can not be ignored. It provides that Travelers duty to
27 indemnify is limited to accidents or occurrences, which are covered by the controlling
28

1 underlying insurance. This indemnity provision unambiguously presupposes a
2 determination of whether or not the accident or occurrence is “covered by the terms” of
3 the underlying insurance. Dawn may not expand the coverage beyond what the parties
4 intended as set forth in its insuring agreement. Dawn admits that the Cal Union policy is
5 controlling and that it contains a sudden and accidental pollution exclusion. If Dawn’s
6 damage is not covered by the terms of the Cal Union policy, then by operation of the
7 plain language of Travelers’ insuring agreement, Travelers’ duty to indemnify is not
8 triggered.

9 Plaintiffs contend that Travelers should not be permitted to rely upon the Cal
10 Union sudden and accidental pollution exclusion because the provisions of Travelers'
11 policy and the terms of the Cal Union policy conflict. Their argument is that by
12 including a pollution exclusion that only applies to Newmont Oil in the 77-78 policy
13 “Travelers negated any incorporation of the underlying California Union sudden and
14 accidental pollution exclusion that would otherwise apply to all Newmont subsidiaries.”
15 The court rejects this contention. Travelers did not at any time “negate” any part of its
16 insuring agreement -- they only duplicated them. The terms of the stated exclusions were
17 not in conflict with the underlying Cal Union policy.

18 Finally, Plaintiffs contend the court should judicially estop Travelers from making
19 its argument because in New York, Travelers claimed an applicable pollution exclusion
20 clause was “contained within” each of its policies, without any mention or attaching the
21 underlying Cal Union policy. It appears Newmont and Travelers have at times conducted
22 this coverage litigation differently than in New York. The New York case having been
23 dismissed, this argument is irrelevant. Moreover, it is likewise unnecessary for the court
24 to decide whether it is technically accurate or not to state the pollution exclusion
25 provision is "contained within" the policy as opposed to stating it is incorporated by
26 reference to the terms of the underlying policy in the insuring agreement.

27 **3. Conclusion Re: Travelers**

28 The plain language of the Travelers’ 77-78 insurance policy provides that

1 Travelers' coverage is only triggered upon there being a covered event as provided for by
 2 the underlying Cal Union policy, which undisputedly, does contain a sudden and
 3 accidental pollution exclusion with potential application to Dawn. The Travelers' portion
 4 of Plaintiffs' Motion for Summary Judgment Re: Pollution Exclusions (**ECF No. 675**) is
 5 therefore Denied.

6 **B. OneBeacon**

7 **1. Facts**

8 OneBeacon's predecessor, Employers' Surplus Lines Insurance Company
 9 ("ESLIC"), issued two excess-level comprehensive general liability policies to Newmont:
 10 policy no. E60003, covering the period July 1, 1969 to July 1, 1972, and policy no.
 11 E60104, also covering July 15, 1969 to July 1, 1972. ECF No. 684, Ex. 35, 36. On
 12 September 1, 1971, OneBeacon added Endorsement 13 to the policies, which had a
 13 retroactive effective date of March 9, 1971. The exclusion in its entirety states:

14 It is hereby understood and agreed that this policy shall not cover any liability
 15 imposed upon the insured by law or assumed by the insured under contract for:

- 16 1. Loss of hole or in-hole equipment (including fishing expenses), or any
 expense incurred in regaining control of any oil or gas well,
- 17 2. Loss of or damage to any of the following:
 - a. Oil, gas, water or other mineral substances which have not been
 reduced to physical possession above the surface of the earth;
 - b. Any well, hole, formation, strata or area in or through which
 exploration for or production of any substance is carried on.
- 18 3. Property damage arising out of the blowout or cratering of any oil or gas
 well.
- 19 4. Property damages resulting from any contamination by saline substance
 including property damage to any of the following wherever located:
 - a. Oil gas, water or other mineral substances, if the property damages is
 caused directly or indirectly by a saline substance;
 - b. Any other property, if the property damage results from the property
 damage described in (a) above.
- 20 5. Loss of, damage to or loss of use of drilling tools, pipes, collars, supplies,
 machinery and equipment leased by or rented to, or in the care, custody and
 control of any insured.
- 21 6. Loss of, damage to, or loss of use of property directly or indirectly resulting
 from subsidence caused by sub-surface operations of the assured.
- 22 7. Seepage, pollution or contamination hazards as follows:
 - a. Personal injury or bodily injury or loss of, damage to, or loss of use of
 property directly or indirectly caused by seepage, pollution or
 contamination.
 - b. Cost of removing, nullifying or cleaning-up seeping, polluting or
 contaminating substances.
 - c. Fines, penalties, punitive or exemplary damages.

1 [Petrie Decl. ¶ 43 & Ex. 35 at 620-21]

2 Eight months prior to adding Endorsement 13, Endorsement 9 was added to the
3 OneBeacon policies which related in particular to a Newmont Oil company joint venture
4 interest in Texas. Endorsement 14 was also added at the same time as Endorsement 9 to
5 amend the list of Named Insureds to include 27 entities, including Newmont Oil
6 Company. OneBeacon's underwriter testified in his deposition that oil exclusions were
7 developed in response to the Santa Barbara oil spill in the winter of 1970.

8 The parties agree the damage underlying this case does not involve oil and gas
9 drilling operations.

10 **2. Analysis**

11 OneBeacon contends that in this action Dawn seeks the "cost of removing,
12 nullifying or cleaning-up seeping, polluting or contaminating substances" and that
13 therefore, under Paragraph 7 of Endorsement 13, the court must conclude that the
14 absolute pollution exclusion precludes all coverage that Dawn seeks. Prior to the
15 dismissal on appeal of the New York case, OneBeacon had successfully persuaded
16 Justice Ramos to conclude as to Newmont that this pollution exclusion was "clear and
17 unambiguous, and thus enforceable to the extent of excluding coverage for liability that
18 stem from the 'cost of removing, nullifying or cleaning-up seeping, polluting or
19 contaminating substances.'" Dawn cross moves for summary judgment herein, raising an
20 argument that was never raised in the New York litigation-- that Paragraph 7 of
21 Endorsement 13 is not an absolute pollution exclusion, but rather an exclusion which
22 applies only to Newmont's oil/gas operations.

23 Both Plaintiffs and OneBeacon submit firstly that the language of this exclusion is
24 unambiguous; neither party believes it is necessary to consider the extrinsic evidence to
25 interpret the exclusion. With the principles of policy interpretation in mind, the court
26 turns to the insurance policy and the language of Endorsement 13. Notably none of the
27 endorsements attached to the policy, including Endorsement 13, contain titles;
28 Endorsement 13 does not contain express language limiting its application to certain of

1 Newmont's operations (as did endorsement 9); and it is undisputed that paragraphs 1
2 through 4 of Endorsement 13 specifically apply to the gas industry.

3 Though the words in Paragraph 7 appear without any particular qualification, it is
4 elementary that the meaning of particular words or phrases in insurance policies is not
5 determined by considering the word or phrase in isolation. *Allstate Ins. Co. v. Peasley*,
6 131 Wash.2d 420, 424(1997). The policy must be read as a whole, and the meaning of
7 words which are doubtful or obscure taken by themselves may be clarified by reference
8 to associated words. One court has done just that in addressing this same issue in the
9 context of a policy containing a similar 7-paragraph oil and gas industries endorsement
10 (even with identical language as contained in OneBeacon's Paragraphs 1,6, and 7)--
11 *Carey Canada, Inc. v. California Union Ins. Co.*, 748 F.Supp. 8, 15 (D.D.C. 1990). In
12 *Carey Canada*, the insured, an asbestos manufacturer, was a defendant in a suit brought
13 by the owners of buildings containing asbestos. In a coverage action with the
14 manufacturer's insurer, the insurer argued (as OneBeacon does here) the paragraph
15 pertaining to "seeping, polluting or contaminating substances" precluded coverage of the
16 asbestos claim. In construing the language of the policy, the court relied upon the maxim
17 *noscitur a sociis* ("it is known from its associates"), whereby an ambiguous term may be
18 given more precise content by the neighboring words with which it is associated. The
19 court construed the more general "seeping, polluting, or contaminating substances"
20 language consistent with the other terms of the Endorsement, which utilized terms of art
21 associated with the oil and gas industry. The court concluded as a matter of law that the
22 exclusion did not apply and only was a bar to coverage incidental to the insured's gas
23 operations.

24 Relying upon the *Carey Canada* decision, it is Plaintiffs contention that the insurer
25 likewise neglected to insert the qualifying language or title to this Endorsement which
26 would have explicitly limited its application to Newmont's oil/gas operations.
27 OneBeacon disagrees any limitation on its application was intended. To accept the
28 construction proffered by OneBeacon, the court would have to believe that the drafter of

1 the policy, having enumerated at least four classes of oil and gas exclusions, then
2 suddenly changed to set forth only generally applicable exclusions. To say the least, the
3 court agrees that such an interpretation is strained. The court finds as a matter of law that
4 given the qualified scope of at least the first four (a majority) exclusions, the
5 Endorsement is ambiguous as to whether it applies to Newmont's mining operations.

6 An insurance policy must be ordinarily enforced according to its plain meaning.
7 Accepting Plaintiffs argument would require the court to qualify the plain language of
8 Paragraph 7, which only be acceptable if it does not produce a result at odds with the
9 intention of the parties. Whereas here, an ambiguity exists, the court can resort to
10 extrinsic evidence or canons of construction, such as *noscitur a sociis*, relied upon by the
11 *Carey Canada*, as an aid in determining the intended application of the policy.

12 In this case, the extrinsic evidence shows that the language utilized in Endorsement
13 is a type of form language utilized in the insurance industry, typical of oil and gas
14 industry exclusions. The same year Endorsement 13 was added to the policies,
15 OneBeacon also added additional language pertaining to Newmont's oil operations. The
16 most illuminating extrinsic evidence are written communications only months prior to the
17 Endorsement's signing. On May 3, 1971, OneBeacon's representative wrote to
18 Newmont's representative "[W]e would like to attach an **oil industries exclusion**
19 endorsement, a copy of which is attached." On May 7, 1971, Newmont wrote back to
20 OneBeacon "[a]s respects the **Oil Industries exclusion**...we would appreciate you
21 considering the use of your Form 13 in lieu of this form." On June 2, 1971, OneBeacon
22 wrote to Newmont, "Additionally, we will need to...add the **Oil Industries Exclusion** as
23 outlined in Sam Alexander's letter dated May 3, 1971."

24 The underwriting file contains a form **Oil Industries Exclusion** Endorsement, with
25 this title crossed out. The language in this form is identical to the language of
26 Endorsement 13 (without the title). OneBeacon contends the omission supports their
27 contention that the parties intended to leave out limiting language, and therefore, intended
28 that the particular clause or section would not be limited to the oil and gas industry.

1 Neither the deposition testimony of Plaintiffs' insurance expert or OneBeacon's 30(b)(6)
2 witness address the specific issue concerning the meaning of Endorsement 13.

3 Where there is extrinsic evidence that sheds light on the intent of the parties and
4 different inferences could be drawn from the extrinsic evidence, its construction becomes
5 a question for the jury. Issues involving the parties' intent and deciding which of several
6 documents expresses the terms of the parties' agreement are a task for the jury, for which
7 summary judgment is not proper. *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977,
8 982-983 (9th Cir.1999) (whether insurance policy provided term or whole life insurance
9 was question of fact because policy was reissued several times and terms varied). Cf.
10 *American Star Ins. Co. v. Grice*, 121 Wash.2d at 878 (where insurance policy exclusion is
11 ambiguous and in absence of extrinsic evidence showing an understanding that coverage
12 was intended to be excluded, policy is construed to provide coverage); *Berg v.*
13 *Hudesman*, 115 Wash.2d 657(Wash. 1990); *Robertson v. Wilson*, 121 Wash. 358 (Wash.
14 1922)(where the extrinsic evidence is undisputed, the construction falls within the general
15 rule, and the court must construe the contract); *see also State v. Home Indem. Co.*, 66
16 N.Y.2d 669 (1985) ("[I]f the tendered extrinsic evidence ... will not resolve the
17 equivocality of the language of the contract, the issue remains a question of law for the
18 court ... [and] the ambiguity must be resolved against the insurer which drafted the
19 contract.").

20 Accordingly, the court denies the Plaintiffs' and OneBeacon's Motions For
21 Summary Judgment regarding OneBeacon's pollution exclusion clauses. Based upon the
22 court's conclusion herein that as a matter of law that an ambiguity in OneBeacon's
23 policies exists, the court will let the trier of fact answer whether the parties intended
24 Paragraph 7 of Endorsement 13 to apply to Newmont's mining operations.

25 **VI. Nuclear Energy Liability Exclusion**

26 OneBeacon and Stonewall joined in Appalachian's Motion For Partial Summary
27 Judgment alleging that the nuclear energy liability exclusion clause contained within their
28 policies applies to preclude coverage [ECF No. 657, 666].

1 It is undisputed that each of the OneBeacon and Stonewall policies at issue contain
2 exclusions which eliminate coverage for "injury...or destruction resulting from the
3 hazardous properties of nuclear materials, if (a) the nuclear material (1) is at any nuclear
4 facility owned by, operated by or on behalf of, an insured or(2) has been discharged or
5 dispersed therefrom;...." ECF No. 666 at 3. The exclusions define "nuclear facility" to
6 be "(d) any structure, basin, or excavation, premises or place prepared for or used for the
7 storage or disposal of **waste**...." *Id.* at 4. The policy defines "waste" to be "any waste
8 material (1) containing byproduct material **and** (2) resulting from the operation by any
9 person or organization of any nuclear facility included within the definition of nuclear
10 facility under paragraph (a) or (b)." *Id.* at 3-4. The policies define "byproduct material"
11 to have the same meaning as the Atomic Energy Act ("AEA") provides. At the time the
12 policies were issued, the AEA defined "byproduct material" to be "any radioactive
13 material (except special nuclear material) yielded in or made radioactive by exposure to
14 the radiation incident to the process of producing or utilizing special nuclear material."
15 ECF No. 736 [Plaintiffs' Counterstatement of Facts] at ¶ 67. Special nuclear materials
16 was defined to be "plutonium, uranium enriched in the isotope 233 or in the isotope 235."
17 *Id.*

18 To prevail on their coverage defense, the carriers must prove beyond genuine
19 dispute that the exclusions apply. The court notes that other than their two-page joinder,
20 OneBeacon and Stonewall relied upon the moving papers of Appalachian and then filed
21 its own Reply, even though the exclusion language of their policies differed. There is no
22 evidence that Dawn stored or disposed of "waste" at the Midnite Mine, as that term is
23 defined by the policy. It is undisputed that the Midnite Mine operation involved mining
24 natural uranium ore and that it did not produce or utilize *enriched* uranium. OneBeacon
25 and Stonewall contend the exclusion was intended to apply to "uranium in any physical
26 form." This interpretation of the language requires one to ignore the keyword "and" in
27 the policies' definitions of "waste." The court rejects the contention that this word is
28 superfluous, and in denying the movants' motion, concludes as a matter of law that the

1 nuclear exclusions contained within the OneBeacon and Stonewall policies at issue do
2 not preclude coverage.

3 **VII. Extra-Contractual Claims / Bad Faith**

4 Before the court are also Travelers' Motion for Summary Judgment Against
5 Plaintiffs' Extra-Contractual Claims [ECF No. 603] and OneBeacon and Stonewall's
6 Motion for Summary Judgment Re: Bad Faith [ECF No. 627]. The moving carriers
7 request that the court grant summary judgment in their favor as to all Plaintiffs' Fourth,
8 Fifth and Sixth Claims for Relief as set forth in their First Amended Complaint (ECF
9 241)(Claims for Bad Faith, Breach of Fiduciary Duties and Consumer Protection
10 Act) ("extra-contractual claims"). Each of these claims turn upon the same alleged "bad
11 faith" unreasonable conduct of the Insurers in handling their claims. Plaintiffs'
12 Amended Complaint contains a generally plead list of alleged bad faith acts generally
13 alleged against all of the Defendants. Plaintiffs' response to these motions only identifies
14 a certain limited number of claims against these Defendants. Plaintiffs are not pursuing
15 the other generally-pleaded bad faith claims in the First Amended Complaint against
16 these three Defendants. OneBeacon and Stonewall call these claims "nothing more than
17 a litigation tactic designed to paint the excess insurers as bad actors so as to create
18 'leverage' in connection with the legitimate coverage disputes between the parties." ECF
19 No. 776 at 3. Plaintiffs claim these carriers "chose to put their heads in the sand" while
20 handling Newmont and Dawn's claims and that they should be held responsible for this
21 behavior where the law requires them to act in good faith and promptly in both their
22 communication and investigation.

23 **A. Choice of Law**

24 This court has already ruled upon Plaintiffs' claims for bad faith breach of the duty
25 to defend. ECF No. 216 (November 13, 2009 Order). Those claims were based upon
26 contractual obligations in the insurers' contracts. The court specifically held OneBeacon
27 had no duty to defend, and therefore could not have been in bad faith breach. *Id.* The
28 court conducted a choice of law analysis on the issue of bad faith when the alleged breach

1 is tied to damage resulting from a *breach of contractual* obligations. This was necessary
2 because under New York law such claims sound in contract, whereas Washington
3 recognizes an independent tort. The court held choice of law principles favored the
4 application of Washington law to that issue. ECF No. 216 at 23.

5 Plaintiffs contend the same conflict of laws analysis the court performed in
6 November 2009 ought to apply here to Plaintiffs' remaining bad faith claims. However,
7 the nature of the remaining bad faith claims differ. They are not based on the terms of the
8 insurance contract. Instead Plaintiffs rely upon the insurers' general duties of good faith
9 implicit in all contracts and statutory obligations set forth in Washington laws specifically
10 directed toward the insurance industry.

11 Both New York and Washington law recognize the duty of good faith and fair
12 dealing, implicit in all contracts, including contracts of insurance. Though not
13 implausible (but *very* rarely in New York), both states have recognized the existence of
14 an independent common law cause of action for breach of the duty good faith and fair
15 dealing for bad faith claims handling. *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*
16 *of New York*, 10 N.Y.3d 187, 886 N.E.2d 127 (N.Y. 2008) ("When an insured ... suffers
17 additional damages as a result of an insurer's excessive delay or improper denial, the
18 insurance company should stand liable for those damages. This is not to punish the
19 insurer, but to give the insured its bargained-for benefit."). However, New York
20 insurance law does not provide a private right of action for bad faith claims handling.
21 Washington does so provide under its Consumer Protection Act statute. Accordingly, the
22 law conflicts.

23 However, as Defendants suggest, there is no outcome determinative conflict of
24 law. Under either states' laws, Plaintiffs' allegations, as a matter of law, do not indicate
25 behavior that rises to the level of bad faith (frivolous and unfounded) excess insurer
26 conduct. Accordingly, as no outcome determinative conflict of laws exists, and the court
27 utilizes the presumptively applicable law of the Washington forum.

28 **B. Elements of Bad Faith Claims Handling Claim**

1 Insurers have an implied duty of good faith to their policyholders, which is based
2 on its quasi-fiduciary relationship and in Washington, its statutory and regulatory
3 obligations to an insured. *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d
4 122 (Wash. 2008); *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 484, 78 P.3d 1274 (2003);
5 RCW 48.01.030 (“[t]he business of insurance is one affected by the public interest,
6 requiring that all persons be actuated by good faith, abstain from deception, and practice
7 honesty and equity in all insurance matters.”). Like most states, Washington has
8 administrative regulations governing the claims handling process which are found at
9 chapter 284-30 of the Washington Administrative Code (WAC).

10 The cause of action for bad faith claims handling is not dependent on the duty to
11 indemnify, settle or defend. Actionable bad faith is a tort in Washington. To succeed on a
12 bad faith claim, the policyholder must demonstrate a duty, the insurer’s breach of that
13 duty, and damages proximately caused by any breach of the duty. *Smith*, 150 Wash.2d at
14 485. In order to establish bad faith, an insured is required to show the insurer’s breach was
15 “unreasonable, frivolous, or unfounded.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 560
16 (1998)).

17 In this case, all three of the moving carriers are excess carriers and it is undisputed
18 now that none of the policies required them to defend. An excess insurer’s duties to its
19 insured go beyond those that are expressly stated in its policy. Under Washington law
20 every insurer has a duty of good faith, RCW 48.01.030, and a specific duty to act
21 reasonably promptly, in both communication and investigation, in response to a claim or
22 tender of defense. WAC 284-30-330(2)-(4); WAC 284-30-360(1), (3); WAC 284-30-370.
23 Essentially, these requirements are intended to demand an insurer “deal fairly with an
24 insured, giving equal consideration in all matters to the insured’s interest.” *Tank*, 105
25 Wash.2d 381, 386 (Wash. 1986).

26 Though any insurer, whether excess or primary, is subject to a duty to “deal fairly,”
27 what the obligation requires of an excess insurer is different. As Windt’s insurance law
28 treatise explains:

[U]nder the terms of a Particular policy, an insurer may have no obligation to do anything, despite having been put on notice of a claim. For example, when an excess insurer is put on notice of a claim, it is not automatically obligated to take any action if it has no duty to provide a defense. Beyond a general duty of good faith and fair dealing-obligating the excess insurer reasonably to respond to reasonable questions from its insured about coverage-the excess insurer would not be obligated to do anything unless and until the amount of the primary limits were made available to settle the claim against the insured. Only at that point might the excess insurer have a duty to provide any policy benefits; accordingly, it is only at that point that the excess insurer must come to a conclusion as to the settlement value of the covered claims. An excess insurer might have previously monitored the litigation and conducted an investigation, but if it did so, it would not have done so out of any legal obligation to take such actions at that time. It would have done so because, as a practical matter, it might not later have had adequate time to evaluate the claims made against the insured if and when the primary limits were tendered and the excess insurer was called upon to make a contribution to a settlement.

Allan Windt, Insurance Claims & Disputes § 2.01 at pp. 31-32 (3d ed. 1995) (fns. omitted). Washington insurance law expressly allows excess insurers to rely upon the investigation of a primary insurer.

C. Standard of Review on Motion for Summary Judgment

Whether an insurer has acted in bad faith is ordinarily a question of fact. *Smith*, 150 Wash.2d at 484. On a motion for summary judgment, the court considers if “reasonable minds could differ that the insurer’s conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer’s action.” *Id.* at 486. If so, then summary judgment is not appropriate. “If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable minds could not differ that its denial of coverage was justified. However, the existence of some theoretical reasonable basis for the insurer’s conduct does not end the inquiry. The insured may present evidence that the insurer’s alleged reasonable basis was not the actual basis for its action, or that other factors outweighed the alleged reasonable basis.” *Id.*

D. Discussion

Against this legal backdrop, the allegations against these three excess insurers are analyzed. As excess insurers, the moving Defendants’ duties to indemnify turn on the exhaustion of underlying umbrella/primary policies. It is undisputed that Plaintiffs

1 informed their carriers in 1997 when they received a CERCLA Section 104(e) records
2 request and again in 2005 after the EPA filed suit. By late 2006, the EPA's Record of
3 Decision was disclosed, which set forth the overall planned remedial action at the
4 Midnite Mine Site. Projected cost scenarios ranged from \$44.4 million to \$218 million.
5 Plaintiffs invited all insurers to two meetings in 2006 to discuss information relating to
6 the EPA litigation. Though some excess insurers did attend, Travelers, OneBeacon, and
7 Stonewall did not, in part, they claim, because they had no defense obligation.

8 *1. Material Facts Specific to OneBeacon and Stonewall*

9 After Plaintiffs gave notice in 1997, the record reflects communications from
10 OneBeacon to Plaintiffs at least five times throughout 1998, with OneBeacon requesting
11 additional information. On May 4, 1999, OneBeacon sent Plaintiffs a letter denying
12 coverage. ECF 334 at 154-65. Stonewall responded to Plaintiffs on August 2, 1999 with
13 a reservation of rights letter.

14 After the EPA filed suit in 2005, OneBeacon and Stonewall shared the same third-
15 party administrators/claim handlers. Plaintiffs notified the carriers of the CERCLA
16 action in May 2005. OneBeacon and Stonewall have submitted as part of the summary
17 judgment record copies of two detailed reservation of rights letters, with the signature
18 line of OneBeacon and Stonewall's third party administrator, with dates on both of them
19 of June 11, 2005. The letters appear to respond to Plaintiffs' May 2005 notice of the
20 EPA lawsuit. However, as Plaintiffs note, these letters are not on letterhead, are not
21 signed, and there is no other evidence to verify that the letters were actually mailed or
22 received by Plaintiffs. After conducting a recent search of its records, Plaintiffs could not
23 find such letters as part of their files.

24 On December 20, 2006, Plaintiffs provided to OneBeacon and Stonewall's third-
25 party claims administrator, Kathleen Koval of Resolute Management, information
26 regarding exhaustion of the underlying policies and explained that providing further
27 information would breach confidentiality provisions in settlements with other carriers.
28 This position was restated in an April 6, 2007 letter. On January 26, 2007, Plaintiffs'

1 lawyers sent to Koval a letter with a copy of the EPA's Record of Decision. That ROD
2 outlines various total reclamation cost scenarios ranging from \$44.4 million to \$218
3 million. There is record support that Koval reviewed the ROD and noted the calculation
4 of potential costs.

5 It is undisputed that on March 9, 2007, OneBeacon sent Plaintiffs a reservation of
6 rights letter. ECF No. 173 at 29. That letter acknowledged receipt of the underlying
7 complaint filed by the EPA and advised that '[t]he information that we currently have
8 does not indicate that all applicable underlying coverage is exhausted and as such,
9 [OneBeacon], owes no coverage duty to Newmont Mining at this time." *Id.* On May 2,
10 2007, Stonewall responded with a similar letter.

11 *2. Material Facts Specific to Travelers*

12 On December 29, 1997 and January 30, 1997, Travelers wrote to Plaintiffs stating
13 among other things that its policies required the exhaustion of underlying limits to be
14 reached before Travelers level of participation could be involved. Travelers also
15 informed Plaintiffs that as no claim or lawsuit had been asserted, the CERCLA request
16 for records did not obligate it to determine whether it had an indemnity obligation. It
17 then advised Plaintiffs to provide timely notice when that occurred. After the EPA filed
18 suit, on May 23, 2005, Travelers acknowledged Plaintiffs' notification of the EPA suit.
19 On September 16, 2005, Travelers issued a full reservation of rights letter asserting that it
20 had not been given information that the action could reach its excess of \$4.5 million over
21 primary limits and that it was unlikely its policies would be implicated because of the
22 "pollution language" in the policies. The letter invited Plaintiffs to provide any
23 information which would suggest a contrary determination should be reached.
24 Travelers' Vice President, Robert Harris, testified that most often, in his experience,
25 actual clean up costs (as opposed to not covered business expense of reclamation costs)
26 ordinarily do not range in the hundreds of millions of dollars.

27 Travelers' investigates claims in three phases: the first phase is to investigate
28 whether a claim is of sufficient magnitude that it is reasonably likely to implicate its

1 policies; the second phase involves requesting underlying carriers' investigation files and
2 information from Plaintiffs, and phase three is to determine whether additional
3 information was required to make a coverage determination. Travelers admits only
4 having begun phase one prior to the coverage litigation. Travelers claims Plaintiffs did
5 not provide the necessary information to proceed beyond the first phase, and thus it was
6 not until the coverage litigation that it was able to obtain the information and proceed
7 with its investigation.

8 *3. Bad Faith Failure to Investigate and Articulate a Coverage Position*

9 Plaintiffs claim the insurers took either no or very limited factual investigation
10 regarding the Midnite Mine, never made an assessment of potential liability, and never
11 provided Newmont and Dawn with a coverage position until litigation commenced. An
12 insurer's duty to investigate arises in a variety of contexts and serves a number of
13 different purposes. The nature and extent of this duty depends upon the type of policy,
14 the type of claim, and the applicable law in each jurisdiction. As explained by Windt (in
15 the quoted section above), given the excess insurers more limited exposure, the moving
16 Defendants did not have the same obligations to investigate the Midnite Mine and
17 disclose their coverage position as promptly as a primary insurer would have. Though
18 another excess insurer saw potential benefit in attending Plaintiffs meetings and/or
19 conducting its own an early investigation of the facts, these facts do not demonstrate that
20 these insurers had any legal obligation to investigate more thoroughly or promptly, nor
21 does it demonstrate unreasonable conduct on behalf of these insurers. Though the
22 Defendants are not obligated to rely upon the investigative file of a primary insurer, the
23 law says they can. The parties admit that access to information from underlying insurers
24 gathering has been hampered.

25 Plaintiffs' claim the moving insurer Defendants failed to articulate a coverage
26 position in violation of WAC 284-30-330(4), which calls for an insurer to "affirm or deny
27 coverage of a claim within a reasonable time after fully complete proof of loss
28 documentation has been submitted." It is undisputed that "complete proof of loss

1 documentation" was not made available to these insurers prior to discovery in this
2 coverage litigation. To avoid the reality of these facts, Plaintiffs claim there is no "proof
3 of loss" language in their insurance policies, and therefore these insurers had a duty to
4 affirm or deny coverage within a reasonable time from the "date of tender of the claim."
5 Yet, OneBeacon and Stonewalls' policies include terms requiring the insured to "make a
6 definite claim for any loss...after the [insured] shall have paid an amount of ultimate net
7 loss in excess of the amount borne by the insured..." and further providing that losses
8 shall be payable after they are "claimed and proven" in conformity with the policy. ECF
9 No. 684, Ex. 35, 36, 44, 45.

10 Plaintiffs have not and can not on this record demonstrate that Defendants acted in
11 bad faith in failing to more promptly announce a coverage position, despite issuance of a
12 reservation of rights letters and requests for more information.

13 *4. Failure to Promptly Respond in Communications*

14 Plaintiffs claim OneBeacon and Stonewall failed to respond promptly to
15 communications. Assuming as the court must, that -- Plaintiffs never received the June
16 2005 letters, and that OneBeacon and Stonewall intentionally delayed formally
17 acknowledging the May 2005 notice of the EPA's lawsuit until March and May **2007** --
18 without any other evidence, it would be fair to conclude this particular communication
19 was not reasonably prompt and could perhaps be evidence bad faith. However, mere
20 delay does not per se constitute bad faith. The remainder of the record belies the
21 suggestion that this delay somehow can prove bad faith insurance claims handling
22 behavior. Indeed, it is nowhere near the 6-year absence of *any* communications existing
23 in the bad faith case relied upon by Plaintiffs, *Goodrich Corp v. Commercial Union*, 2008
24 WL 2581579 (Ohio Ct. App. June 30, 2008). In fact, the record evidences that
25 OneBeacon and Stonewall had acknowledged the Midnite Mine insurance claim in
26 numerous prior communications stemming since 1998. Indeed, even after the 2005
27 notice of the EPA lawsuit, Plaintiffs knew of and were providing information
28 (presumably based on earlier requests for such) to OneBeacon and Stonewall's third party

1 administrator, Kathleen Koval. This record evidences OneBeacon and Stonewall had
2 been acting on the claim since 1998. Even if believed that a formal acknowledgment of
3 the 2005 notice of suit was never received, that lone fact is insufficient to demonstrate
4 bad faith given the other communications of record.

5 *5. Conclusion Re: Bad Faith*

6 While it is generally true an insurer may not hide its head in the sand upon given
7 notice of a claim or potential claim, the undisputed evidence in this case is that all three
8 remaining excess insurers communicated with Plaintiffs, gathered information about their
9 policies, requested follow up information, and issued detailed reservation of rights letters.
10 None had a duty to defend the CERCLA action. Admittedly, Plaintiffs could not provide
11 their excess insurers all necessary information included in the underlying policies due to
12 confidentiality agreements with the other carriers. ECF No. 742 at 15 (“Newmont and
13 Dawn could not more meet those requests than they could spin straw into gold.”).
14 Plaintiffs bad faith claims turn on whether a duty was breached and whether that breach
15 was “unreasonable, frivolous, or unfounded.” *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558,
16 560 (1998). Even viewing this evidence most favorable to Plaintiffs, Plaintiffs have
17 failed to come forward with evidence that the insurers acted unreasonably. Ultimately,
18 the duty of good faith is about fairness and fair dealing, and there is no evidence
19 Defendants' conduct has impaired or injured Plaintiffs' rights under their insurance
20 agreements. Plaintiffs have failed to raise material issues of fact with respect to the
21 reasonableness of the insurers' action.

22 **E. Consumer Protection Act (CPA) Claims**

23 The Washington CPA provides that “unfair or deceptive acts or practices in the
24 conduct of any trade or commerce” are unlawful. RCW 19.86.020. An insured may
25 invoke the CPA against an insurer that violates RCW Title 48 or the administrative
26 regulatory provisions set forth at WAC 284-30-300 through 284-30-410. *See Industrial*
27 *Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wash.2d 907, 792 P.2d 520, 529 (Wash.
28 1990). A CPA claim requires (1) an unfair or deceptive practice, (2) in trade or

1 commerce, (3) that affects the public interest, (4) which causes injury to the party in his
2 or her business or property, and (5) which injury is causally linked to the unfair or
3 deceptive act. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 2 P.3d 1029,
4 1033 (Wash.Ct.App.2000).

5 As stated above, Plaintiffs have not set forth evidence sufficient to establish that
6 the insurers' acted unreasonably, nor violated state law, in their communications or
7 investigations. Accordingly, these allegations do not support Plaintiffs' CPA claim. In
8 their response to the Motions For Summary Judgment Plaintiffs additionally claim that
9 conduct occurring during the course of this coverage litigation also provide a factual
10 basis for their Consumer Protection Act claims against Travelers, OneBeacon, and
11 Stonewall. Plaintiffs assert the moving Defendants have engaged in "bad faith litigation
12 conduct" akin to "fraud on the court."

13 Washington has not ever considered such an application of its Consumer
14 Protection Act, though other jurisdictions have. *See e.g., Munshani v. Signal Lake*, 60
15 Mass.App.Ct. 714, 718 (2004)(“A ‘fraud on the court’ occurs where it can be
16 demonstrated, clearly and convincingly, that a party has sentiently set in motion some
17 unconscionable scheme calculated to interfere with the judicial system’s ability
18 impartially to adjudicate a matter by improperly influencing the trier or unfairly
19 hampering the presentation of the opposing party’s claim or defense.”); *Whitlock v. Bob*
20 *Moore Cadillac, Inc.* 938 P.2d 737 (Ok 1997)(unsuccessful pursuit of a fancied remedy
21 through litigation cannot be characterized as in bad faith without showing of improper
22 purpose)

23 Plaintiffs claim Travelers fraudulently obtained a judgment in New York and res
24 judicata ruling from this court by misrepresenting a fact when it asserted that Policy No.
25 01 XN 1448 (in effect from 7/18/77 to 7/18/78) contained a sudden and accidental
26 pollution barring coverage. ECF No. 563, Petrie Decl para 59, Ex. 56 at para. 4.
27 Plaintiffs claim this one particular policy’s exclusion language was not identical to other
28 Travelers’ policies because by its terms it “only applies to the operations of: ‘Newmont

1 Oil Company.’’ Travelers continues to maintain its position that the policy contains a
 2 pollution exclusion in its opposition to Dawn’s Motion for Summary Judgment re:
 3 Pollution Exclusion (ECF No. 716). Plaintiffs have presented no evidence that Travelers’
 4 representation that the exclusion was “identical” was a position asserted with some
 5 improper, bad faith, purpose.

6 Plaintiffs’ CPA accusations against OneBeacon and Stonewall are likewise without
 7 merit in fact or law. OneBeacon and Stonewall filed a Motion for Summary Judgment
 8 based on the radioactive contamination exclusion contained in its policy. After reviewing
 9 the Plaintiffs’ response to their Motion, defense counsel realized an error and withdrew
 10 their motion. ECF No. 775. Plaintiffs claim the assertions in the summary judgment
 11 motion were taken “in bad faith and has no reasonable basis because it is contrary to both
 12 express policy language and industry practice.” As the motion has been withdrawn and
 13 are no longer being pursued, Plaintiffs’ accusations are **moot**. Plaintiffs' serious
 14 allegations about the conduct of attorneys are also without merit where there is no
 15 evidence this mistake was brought about by some willful attempt to harass or to cause
 16 Plaintiffs unnecessary trouble.

17 With no duty to defend and environmental claims involving decades of
 18 contamination with multiple carriers and decades of coverage, with, *inter alia*, stated
 19 pollution exclusions, Plaintiffs' allegations do not rise to the level necessary to support
 20 their allegations of bad faith claims handling or a violation of the CPA against these three
 21 excess carriers. Accordingly, Defendants' Motions for Summary Judgment as to these
 22 claims are Granted and Plaintiffs' bad faith and CPA claims will be dismissed.

23 **IX. Conclusion**

24 This Memorandum Opinion is consistent with, accompanies, and explains the
 25 reason for the court's disposition of the pending motions as memorialized in the court's
 26 (Amended) Order Re: May 19, 2011 Hearing On Summary Judgment Motions (ECF No.
 27 822).

28 The Clerk shall file this Opinion and forward copies to counsel.

1 Dated June 13, 2011.
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s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE